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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 69-13

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 46.

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

1. Whether respondent's Fourth Amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were infringed when government narcotic agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of state criminal laws.

2. When the government seeks to rely upon consent of one party to a conversation to justify the lawfulness of an electronic search, does the government sustain its burden of proving that the alleged consent was freely and voluntarily given by merely showing that the person was "cognizant" of the eavesdropping?

3. Should this Court, in the exercise of its supervisory powers, and as a deterrent to government agents' surreptitious electronic surveillance of private conversations without prior judicial approval and in violation of state criminal laws, affirm the Court of Appeals' reversal of the convictions below?

4. Is the Fifth Amendment violated by a conviction for transferring narcotics without receipt of a written order form [26 U. S. C., § 4705 (a)], when that requirement is part of a statutory scheme compelling the respondent-transferor to reveal incriminating information?

5. Does the provision of Section 174, U. S. C., Title 21, stating that possession of a narcotic drug is sufficient evidence to authorize conviction thereunder unless the defendant explains the possession thereof to the satisfaction of the jury, unconstitutionally invade the defendant's privilege against self-incrimination?

6. Does the spirit of federal protection against double jeopardy preclude government petitioning of federal appellate courts for rehearing *en banc* of panel decision reversing respondent's conviction, especially where the rules of the Court of Appeals did not specifically provide for such a rehearing?

STATEMENT.

The respondent adopts the government's statement of facts with the exception of the following additions and corrections contained in this Statement and in respondent's Argument, *infra*. The government stated in its Petition for Writ of Certiorari (page 3) that the informant **consented** to the government's electronic eavesdropping. The respondent, in his Brief in Opposition, called this Court's attention to the fact that the record did not confirm the government's contention that the informant consented to anything, including the electronic eavesdropping. We now note that nowhere in the government's Statement contained in its brief on the merits does it contend that the informant consented to its illegal electronic eavesdropping. It should be noted however, that the government still persists in arguing at pages 2, 10, 12, 13 and 21 of its brief, that the informant consented to the government's placing the Kel device on his person. The government cites no page references to the record to support this contention.

At page three of the government's Statement, it states that "A single conversation in the respondent's home and a conversation in a restaurant were also overheard by means of the radio equipment." At page six of the government's Statement, it also refers to "a restaurant." Actually, "a restaurant" was the respondent's mother-in-law's place of business. The name of the restaurant was the Dining House Aluminer (Tr. 194, 564).

SUMMARY OF ARGUMENT.

I.

Respondent's conviction was based largely upon testimony by federal agents that they overheard incriminating statements, transmitted over the air by a "radio kel set" electronic eavesdropping device, made by respondent to a secret government informant. The conversations between the respondent and the secret government informant occurred in several locations including the respondent's home and automobile. The government had no warrant of any kind and the informant did not testify at the trial.

The Fourth Amendment prescribes a constitutional standard that must be met before official invasion of privacy is permitted, namely, a warrant. Here, there was no warrant, but only indiscriminate, uncontrolled use of an electronic device which falls squarely within the proscription of the Supreme Court in **Osborn v. United States**, 385 U. S. 323, cited with approval in **Berger v. United States**, 388 U. S. 41.

The thrust of the government's brief, including its "Questions Presented", relies upon a false premise, to-wit: that the informant "consented" to the government's illegal electronic eavesdropping. The record below and the government's own statement of facts do not support the contention that the informant "consented" to said eavesdropping. Additionally, the Court below specifically did not make a determination regarding the voluntariness of informant's participation in the government agent's scheme to illegally eavesdrop upon respondent's private conversation. Therefore, assuming *arguendo* that "consent" is material to the issues in this case, the record does not support the government's contention that the informant did consent to the illegal search. Also, it was

not respondent's burden to show that consent was **not** given, but it was the government's burden of proving at trial that the informant voluntarily consented to the illegal eavesdropping. **Bumper v. State of North Carolina,** 391 U. S. 543.

Thus, once it is recognized that the record does not establish that either party to the conversation overheard by the federal agents consented to the eavesdropping, it becomes clear that there is no logical distinction between the instant case and **Katz v. United States,** 389 U. S. 347, with the exception that in **Katz** the agents did not eavesdrop within a constitutionally protected area. Additionally, the government fails to cite any authority which holds that the government has the right to surreptitiously eavesdrop upon a conversation without the consent of either party to the conversation. Therefore, this Court should affirm the Court of Appeals' judgment. **Gouled v. United States,** 255 U. S. 298; **Silverman v. United States,** 365 U. S. 505.

II.

Assuming *arguendo* that the record in this case establishes that the informant did, in fact, freely and voluntarily consent to the unlawful eavesdropping, consent by an informant is not controlling in this type of case. **Osborn v. United States,** 385 U. S. 323, 329-330. The law is clear that the government has the burden of proving that its warrantless search is outside judicial process and conducted under such exceptional circumstances that it can validly claim exemption from the general rule that requires the obtaining of prior judicial approval. **Wong Sun v. United States,** 371 U. S. 471. This has not been done by the government.

Nor do the Court's decisions in **Katz v. United States,** cited *supra*, and **Desist v. United States,** 394 U. S. 244,

support the government's contention that respondent's Fourth Amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were not infringed. Additionally, the government agents' conduct in this case were in violation of criminal statutes of the State of Illinois. This Court should exercise its supervisory powers, as a deterrent to similar affronts to proper law enforcement and to maintain the integrity and fairness of the administration of law, and affirm the Court of Appeal's reversal of the convictions below.

III.

The statutes under which respondent was convicted, namely 21 U. S. C., § 174, and 26 U. S. C. 4705 (a), are invalid for the reason that they violate his rights afforded him under the Fifth Amendment of the Constitution of the United States.

Although respondent has never raised the invalidity of the above named statutes, this Court has granted certiorari in two cases to consider the statutes. **Minor v. United States**, No. 189, Oct. term 1969; **Turner v. United States**, No. 1474, Oct. term 1968.

ARGUMENT.

I. **The record below and the government's statement of facts do not support the government's contention in its argument that the informant "consented" to the illegal eavesdropping.**

The thrust of the government's brief, including its "questions presented," relies upon a false premise, to wit: that the informant **consented** to the government's illegal electronic eavesdropping. As shown in respondent's statement, *supra*, the record in this case does not confirm the government's contention that the informant "consented" to anything. Not only does the government fail to cite in its brief one page reference to the record supporting its contention, but the Court below never held that consent was in fact given. The opinion of the Court of Appeals sitting *en banc*, merely states that the informant was "cognizant" of the eavesdropping (App. 135; Pet. App. B, p. 23).[1] The Court below did not make a determination regarding the voluntariness of the informant's participation in the government agents' scheme to illegally eavesdrop upon respondent's private conversations (App. 136; Pet. App. B, p. 24, n. 5).

Thus, assuming *arguendo* that "consent" is material to the issues in this case, the record does not support the government's contention that the informant did consent to the illegal search. Nor was it respondent's burden to show that consent was **not** given. It was the government that had the burden of proving at trial that the informant voluntarily consented to the illegal eavesdropping. **Bumper v. State of North Carolina**, 391 U. S. 543; **Wren v. United States**, 352 F. 2d 617; **Simmons v. Bomar**,

[1] "App." references are to pages in the printed appendix filed in this Court. "Pet. App." references are to pages in the appendix attached to government's petition for writ of certiorari.

349 F. 2d 365; **Judd v. United States**, 190 F. 2d 649; **Kovach v. United States**, 53 F. 2d 639. The government's burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. **Bumper v. State of North Carolina**, 391 U. S. at 549; **Amos v. United States**, 255 U. S. 313, 317; **Johnson v. United States**, 333 U. S. 10, 13. Clearly, the mere knowledge by the informant that a radio device was attached to his person does not sustain the government's burden of proving voluntary consent. "Consent, as a matter of law, means something more than a willingness to cooperate or a formal document expressing consent." **United States v. Jones**, D. C., 292 F. Supp. 1001, 1008.[2]

Once it is recognized that the record does not establish that either party to the conversation overheard by the federal agents consented to the eavesdropping, it becomes clear that there is no logical distinction between the instant case and **Katz v. United States**, 389 U. S. 347. Nor does the government cite any authority which holds that the government has the right to surreptitiously eavesdrop upon a conversation without the consent of either party to the conversation.

Almost 50 years ago, this Court held in **Gouled v. United States**, 255 U. S. 298, that a conviction must be reversed where a government agent, pretending to make a friendly call upon the defendant, gained admission to his office and in his absence, without a warrant, seized several of the defendant's documents. The Court stated:

> "[W]hether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch * * * of the government * * * by

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[2] The defense was prevented at trial from cross-examining government agents about their relationship with the informant (Tr. 62-67, 88, 247-248, 254, 315, 332).

> stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment * * *." 255 U. S. at 306.

This Court's holding in **Gouled** has never been overruled nor has its holding been attacked by subsequent decisions of this Court. Also, since the decision in **Gouled**, this Court has negated the belief that oral conversations can not be the object of a search or seizure. Clearly, such belief has not survived. **Silverman v. United States**, 365 U. S. 505; **Irvine v. California**, 347 U. S. 128; **Lanza v. New York**, 370 U. S. 139, 142; **Wong Sun v. United States**, 371 U. S. 471, 485-486; **Desist v. United States**, 394 U. S. 244, 89 S. Ct. 1030, 1033. Thus, under the rationale of **Gouled**, the instant surreptitious surveillance and seizure of private conversations fall within the scope of the prohibition of the Fourth Amendment.

The facts of this case present a situation no different than if a "bug" had been surreptitiously placed in the respondent's home, car, place of business, or placed in the informant's home without his consent. Here, the government conducted surreptitious surveillance of private conversations carried on in constitutionally protected areas. The government agents that overheard the conversations were indeed "outsiders." Here, as in **Silverman**, the conviction should be reversed because there was "an actual intrusion into a constitutionally protected area." **Silverman v. United States**, 365 U. S. at 512. For as Mr. Justice Douglas stated in his concurring opinion in **Silverman**, it is immaterial what kind of a device is used, but the important consideration is that the privacy of the home was invaded by the government.

For the reasons stated above, this Court's previous holdings in **Lopez v. United States,** 373 U. S. 427; **Osborn v. United States,** 385 U. S. 323; and **On Lee v. United States,** 343 U. S. 747, clearly do not support the government's contention that the instant surreptitious electronic eavesdropping is permissible. We submit that a reversal of this case would give the government the authority to coerce or pressure persons into spying upon their friends, associates, or even members of their own family. A reversal here would be a green light to the government to increase its use of spies, informants, and electronic devices, thereby coercing people to engage suspects in conversation in the privacy of their own home and use that person's private conversation to convict himself of a crime. Additionally, the government wants to be able to conduct such "dirty business" and "electronic snooping" without any judicial controls whatsoever or without probable cause (Gov. Br. 23). We submit that such a policy, whether carried out in this administration or in some future administration, would be a serious threat to the people of these United States, including each individual's rights under the First, Fourth and Fifth Amendments to the Constitution.

II. **Respondent's Fourth Amendment Rights were infringed when government agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of State criminal laws. This Court should, in the exercise of its supervisory powers, as a deterrent to similar affronts to proper law enforcement and to maintain the integrity and fairness of the administration of law, affirm the lower court's judgment reversing the convictions below.**

Assuming *arguendo* that the record in this case establishes that the informant did, in fact, freely and voluntarily consent to the unlawful eavesdropping, respondent submits that "consent" by an informant is not controlling

in this type of case. **Osborn v. United States,** 385 U. S. 323, 329-330; **Berger v. United States,** 388 U. S. 41, 56. Further, the law is clear that the government has the burden of proving that its warrantless searches outside judicial process and without judicial approval were conducted under such exceptional circumstances that it can validly claim an exemption from the general rule that requires the obtaining of judicial approval. **Wong Sun v. United States,** 371 U. S. 471; **United States v. Jeffers,** 342 U. S. 48, 51; **Chimel v. California,** 89 S. Ct. 2034; **United States v. Rivera,** 2 Cir., 321 F. 2d 704. Not only does the record fail to show exceptional circumstances why the government failed to obtain prior judicial approval, but nowhere does the government argue that there were valid reasons for not obtaining judicial approval other than that the agents mistakenly thought it unnecessary. Also, the government does not attempt to justify its contention that in the future, government agents should not have to obtain prior judicial approval before conducting similar electronic surveillance. We submit that there are no overriding reasons for eliminating the necessity of obtaining prior judicial approval for any type of electronic snooping, including the use of electronic "bugs" on informants.

The government states that "the principal issue in this case involves the effect of the Court's decision in **Katz v. United States,** 389 U. S. 347, on earlier decisions . . ." (Gov. br. 12), and that **Katz** does not apply here for the reason that here, the informant **consented** to the eavesdropping. Thus, the government contends that whenever and wherever a person speaks to a third person, that third person can legally waive the speaker's Fourth Amendment rights and surreptitiously broadcast his words to the world without any judicial safeguards. Said contention is clearly erroneous and untenable.

In **Osborn**, the informant consented to the use of the electronic device, but this Court held that the "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments . . ." 385 U. S. at 329. Thus, the electronic recording by the informant was an invasion of the privacy protected by the Fourth Amendment, but the evidence was held admissible because of the prior authorization of the judges. **Berger v. United States**, 388 U. S. 41, 56.

The rationale of the decision in **Osborn** has not only been cited with approval by the majority of this Court in **Berger**, but has been cited with approval in **Katz**, 389 U. S. 347, 355. Nowhere in **Osborn**, **Berger** or **Katz** did this Court conclude that "consent" by a third person was material or determinative of the issues raised, as now claimed by the government. Additionally, this Court in **Katz**, stated: "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U. S. at 351. Here, the record clearly shows and the Court below specifically found, that the respondent justifiably expected his conversations to be private (App. 140, Pet. App. B., p. 28). The Court below also found that the government agents recognized that the respondent sought to exclude their uninvited ears.

As stated in the opinion (*en banc*) below, "the surreptitious placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in **Katz**" (App. 135-136). The electronic eavesdropping in **Katz** and in this case were both part of a "bugging" technique by which the conversations were transmitted to an "uninvited ear," to wit, government narcotic agents. The critical and determinative factor in both cases was that the respective **speakers** did not consent to the overhearing of their statements and same were unlawfully overheard by third per-

sons (government agents), uninvited by the speakers.[3] The situation here is no different than if an informant planted a radio transmitter inside a person's home, his car, etc., prior to engaging the speaker in conversation. In both instances the speaker, although agreeing to the informant's presence, does not agree, nor is he given a chance to disagree, with what would be the presence of someone else altogether. The determinative factor is that the invading microphone enabled third persons, about whom the speaker knew nothing, to be present at the conversations.

The government's argument that a person surrenders his right of privacy whenever he communicates his secret thoughts to a government informant was soundly rejected by Mr. Justice Brennan (joined in by Mr. Justice Douglas and Mr. Justice Goldberg) in his often cited dissenting opinion in **Lopez v. United States**, 373 U. S. 427, 449. Mr. Justice Brennan said: "the assumption, manifestly untenable, is that the Fourth Amendment is only designed to protect secrecy." 373 U. S. at 449. Obviously, if a person commits his secret thoughts to paper, that is no license for the police to seize the paper without proper judicial safeguards and "if a person communicates his secret thoughts verbally to another, that is no license for the police to record the words. Silverman v. United States, 365 U. S. 505." **Lopez v. United States**, 373 U. S. at 449. Respondent suggests that the rationale of Mr. Justice

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[3] Additionally, as pointed out at pages 21-22, *infra*, in **Katz v. United States**, cited *supra*, and **Desist v. United States**, 394 U. S. 244, the government agents only used devices that permitted them to overhear sounds **outside of**, rather than **within**, the constitutionally protected areas. Here, the informant, without a warrant and without respondent's consent, surreptitiously brought the government agents with him into the protected areas to eavesdrop on private conversations. See Mr. Justice Burton's dissenting opinion in **On Lee v. United States**, 343 U. S. 747, 765.

Brennan's opinion applies here and should be followed by this Court.

Additionally, the government's "waiver" contention is untenable if considered in the light of other decisions by this Court. Suppose, for example, a suspect tells a secret government agent that he has narcotics hidden in his house. Obviously, the government must get a search warrant before it can search the house. The fact that the suspect speaks to the informant does not waive his Fourth Amendment rights. See **Chimel v. California**, 89 S. Ct. 2034, and cases cited therein.

The government's reliance upon this Court's decisions in **Lewis v. United States**, 385 U. S. 206 and **Hoffa v. United States**, 385 U. S. 293, is misplaced for those cases presented situations where there was no electronic interception or transmission of the defendants' words. Those cases merely hold that an informant is a competent witness to conversations and dealings with a defendant. Of course, here, the informant never testified, and the government did electronically intercept and transmit the respondent's private conversations.

In **Hoffa**, the Court recognized that the Fourth Amendment protections are not limited to tangibles, but extend to oral statements. 385 U. S. at 301. The Court held that the Fourth Amendment protects the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home, office or automobile. The Court stated that "There he is protected from unwarranted governmental intrusion." 385 U. S. at 301. Although the Court held that the informant was a competent witness to conversations with the defendant, the Court specifically held that the informant was not a "surreptitious eavesdropper." 385 U. S. 302. Here, the government agents were "surreptitious eavesdroppers" and

did intrude into constitutionally protected areas without any judicial controls.

In the **Lewis** case, the question for resolution was whether the Fourth Amendment was violated when a federal narcotics agent, by misrepresenting his identity and stating his willingness to purchase narcotics, was invited into the defendant's home where an unlawful narcotics transaction was consummated and the narcotics were thereafter introduced at defendant's criminal trial. 385 U. S. 206-207. In affirming the conviction, this Court held that the **Silverman** case was inapplicable because "there, the conduct proscribed was that of eavesdroppers, unknown and unwanted intruders who furtively listened to conversations occurring in the privacy of a house." 385 U. S. at 212. This Court quoted from the government's brief that in **Lewis**, there was no design on the part of the government agents to observe or hear what was happening in the privacy of the home and also that the informant did not see, hear or take anything that was not contemplated and in fact intended, by the defendant. Here, however, government agents did hear and take things away [respondent's conversation] that were not contemplated or in fact intended by the respondent. Thus, although the majority of the Court in **Lewis** apparently did not agree with Mr. Justice Douglas' reasoning in his dissent (i. e., that when the government plants a spy in the home of a person to obtain evidence, there is a search and therefore the Fourth Amendment should not be short-circuited), the majority opinion in **Lewis** is not controlling here.

Additionally, the **Hoffa** and **Lewis** cases do not apply here for in these cases the informant did testify at the trial and therefore, the Court's statements regarding the "misplaced trust" by the defendant applied to the informants who testified. Here, the respondent did not mis-

place his trust in persons who testified at trial for the witnesses were government agents who listened surreptitiously to private conversations from outside constitutionally protected areas, without respondent knowing they were eavesdropping on his conversations.

The government in its brief relies upon **Lopez v. United States**, 373 U. S. 427. However, the facts in **Lopez** are distinguishable to the facts here. First, the majority opinion in **Lopez** held that the informant did not violate the privacy of the office for the reason that he did not seize anything surreptitiously or without the defendant's knowledge. Thus, the Court in **Lopez** reasoned that the Court's previous decisions in **Silverman** and **Gouled** were inapplicable. Obviously, this distinguishes the instant case from **Lopez** for here there was a surreptitious seizure of respondent's conversations by government agents. Second, the majority opinion in **Lopez** held that the **Goldman**, **Olmstead** and **Silverman** cases were not in question because there was no eavesdropping in **Lopez** (the agent used a recording device). Here, however, respondent's voice was transmitted over the air to be heard not only by government agents, but by anyone else who happened to be tuned in on that specified radio frequency, thus, there was eavesdropping. Third, **Lopez** concerned the attempted bribery of an Internal Revenue Agent, known to the defendant to be a government agent. Also, in **Lopez**, the same government agent who recorded the defendant's conversation testified at trial, whereas, here the informant never testified at trial through no fault of the respondent and therefore was not subject to cross-examination.

It should be noted that Mr. Chief Justice Warren in his concurring opinion in **Lopez** stated that he thought the **On Lee** case was wrongly decided and should not be revitalized and that he would draw a distinction between

On Lee and **Lopez** as follows: First, in **Lopez** the known government agent was investigating the defendant and said fact was known by the defendant. Second, the known government agent used the recording device in **Lopez** to protect himself.[4] Third, in **Lopez**, the government agent testified at trial.

We submit that the distinction between **On Lee** and **Lopez** drawn by Mr. Chief Justice Warren is applicable here. For instance, here the informant did not testify at trial, but if he had testified, defense counsel could have explored the nature of the informant's friendship with the respondent, could have explored the possibility of other unmonitored conversations and appeals to friendships. Also, the defense could have cross-examined the informant on the issue of consent, police pressure brought to bear to persuade the informant to become a secret government agent, and the informant's own recollection of the contents of all the conversations between himself and the respondent. Indeed, the defense was prevented at trial from cross-examining agents about their relationship with the informant (TR. 62-67, 88, 247-248, 254, 315, 332).

The government argues that it did not purposely keep the informant off the witness stand, but seemingly blames the defense for not asking for a continuance. Obviously, it is not up to the defense to prepare the government's case, locate government witnesses, and to advise government counsel how to properly proceed with the prosecution. Also, as stated by Mr. Chief Justice Warren in **Lopez**, "It is no answer to say that the defense can call an informer * * * as a hostile witness." 373 U. S. at 445. Thus, although Mr. Chief Justice Warren concurred in **Lopez**, he was of the opinion that the informant must testify at the trial. He stated further:

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[4] Mr. Justice Brennan in his dissenting opinion was of the opinion that the I. R. S. agent could always use the recordings to protect himself regardless of whether the evidence so obtained was admissible in a criminal trial.

> "Thus, while I join the Court in permitting the use of electronic devices to corroborate an agent under the particular facts of this case, I cannot sanction by implication the use of these same devices to radically shift the pattern of presentation of evidence in the criminal trial, a shift that may be used to conceal substantial factual and legal issues concerning the rights of the accused in the administration of criminal justice." 373 U. S. at 445-446.

Although the decision of the Court below did not suggest that this Court's decision in **Katz** overruled **Lopez**, respondent submits that the rationale of Mr. Justice Brennan's dissenting opinion in **Lopez** is applicable here and should be followed by this Court. Mr. Justice Brennan was of the opinion that **On Lee** was wrongly decided and should be considered overruled and that **Lopez** and **On Lee** are rationally indistinguishable. Thus, respondent submits to the Court that regardless of the distinguishing factors previously pointed out in this brief between **Lopez** and the facts in the instant case, this Court should review its prior decision and reconsider whether any type of electronic surveillance should be permitted without judicial safeguards.

It is no answer to say that there is no social interest in encouraging respondent and others to sell narcotics. For as stated by Mr. Justice Brennan:

> "Neither is there a social interest in allowing a murderer to conceal the murder weapon in his home. But there is a right of liberty of communication as of possessions, and the right can only be secure if its limitations are defined within a framework of principle. The Fourth Amendment does not forbid all searches, but it defines the limits and conditions of permissible searches . . ." **Lopez v. United States**, 373 U. S. at 450 (dissenting opinion).

The government at page 18 of its brief argues that the critical inquiry in this case is whether the policies of the Fourth Amendment protect a person's expectations that a secret informant will not be carrying a concealed transmitter supplied by federal agents. The government contends that the Fourth Amendment does not protect such an expectation. Respondent submits that although the risk of being betrayed by an informer or deceived as to the identity with whom one deals might be inherent in the conditioning of human society which we assume when we speak, electronic surveillance changes this risk. A person should not have to live in fear that every word he speaks might be transmitted or recorded and subsequently repeated to the world. As stated by Mr. Justice Brennan:

> "There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy." 373 U. S. at 466.

Thus, if this Court should adopt the government's contention, respondent submits that all persons will have to assume that everyone is "bugged" and therefore no person will ever be completely free to speak. Such a result could very well be violative of every individual's rights under the First Amendment and the freedom of speech. In other words, the hazards of electronic eavesdropping are not merely that an individual criminal defendants' Fourth Amendment rights are violated, but that as a people, electronic surveillance could and does restrict people from speaking their minds and expressing their views on important matters. In the few years since this Court's decision in **Lopez**, it has been made public that the government has been conducting electronic surveillance of people all over these United States. Such vast government snooping has become of grave concern to many, including law-abiding citizens of these United States who are not concerned about hiding conversations concerning illegal activity.

The gist of the Fourth Amendment is the security of one's privacy against arbitrary intrusion by the police. We should not forgive the requirements of the Fourth Amendment, in the name of law enforcement. Affirmance of the Court of Appeal's decisions in this case will in no way impede law enforcement agencies. This Court indicated in the **Osborn** and **Berger** cases that if electronic surveillance is of a necessity then Congress should attempt to pass legislation which would permit said surveillance, but under proper judicial sanctions and safeguards. Although it may be that it is impossible to draft such legislation, respondent submits that this Court has indicated that such legislation might be drawn.

It was not solicitude for lawbreakers that caused the people of the United States to ordain the Fourth and Fifth Amendments as part of the Constitution. Criminals will not escape detection and conviction merely because evidence obtained by tapping telephone wires or using different types of bugs is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all people be exposed to the agents of the government, who will act at their own discretion, unauthorized and unrestrained by the Courts. Clearly, electronic surveillance, unrestrained by the Courts, is one of the most critical dangers to the people in these United States.

The government seeks authority to electronically overhear the conversations between people without the necessity of obtaining a warrant. We submit that if the government is allowed to conduct such electronic surveillance without judicial approval, then the only protection an individual might have regarding his right of privacy is to prevent the introduction of evidence seized without probable cause. This Court recently recognized in **Chimel v. California**, 89 S. Ct. 2034, 2042, that the Fourth Amendment interests are not vindicated even though the

rights of the criminal are protected against introduction of evidence seized without probable cause. This Court stated that "the Amendment is designed to prevent, not simply to redress, unlawful police action." 89 S. Ct. at 2042. Thus, the government should be required to go to a judge to obtain a warrant prior to making their electronic intrusion. This would help **prevent** unlawful police action. See also **Osborn v. United States.**

III. **The Court's decisions in Katz v. United States, and Desist v. United States do not support the government's contention that respondent's Fourth Amendment rights protecting him against governmental intrusion by unreasonable search and seizure were not infringed.**

The government contends that **Desist v. United States,** 394 U. S. 244, 89 S. Ct. 1030, requires this Court to reverse the lower Court's judgment. However we submit that **Desist** is not applicable here for if this Court should sustain the government's contention, the government will then be free to continue their indiscriminate and uncontrolled electronic eavesdropping. We submit that such a result would be untenable and that the right of privacy of millions of people would be infringed, regardless of whether they were actually eavesdropped upon by the government.

This Court's holding in **Desist v. United States** is not controlling here for the reason that here, not only did the government intrude upon private conversations, but actually intruded into a constitutionally protected area. **Silverman v. United States,** *supra.* In **Silverman** as well as in **Osborn,** the government agents overheard conversations within the constitutionally protected areas, whereas, in **Desist** and in **Katz,** the government agents merely overheard and recorded conversations which they were able to hear outside the constitutionally protected areas. Thus, in **Desist** and **Katz,** the defendants could seemingly have

prevented the government from overhearing their conversations by lowering their voices.

On Lee v. United States, 343 U. S. 747, is not directly in point with the facts here for the reason that here, as stated previously, the record does not show that the informant consented to the electronic eavesdropping. Thus, even assuming that the government was requesting this Court to review some of its earlier decisions concerning electronic eavesdropping, including the Court's decision in **On Lee**, the respondent submits that none of the previous cases cited by the government hold that evidence obtained in a manner similar to the method used here is admissible. For example, in **On Lee**, the informant was a paid government informer, and the electronically overheard conversations were corroborative of testimony given at trial by the co-defendant, who plead guilty and testified for the government. 343 U. S. 747, 193 F. 2d 306, 311. In **On Lee** either the informant consented to the overhearing, or the defense did not raise the issue of lack of consent by the informant. Clearly, the **On Lee** decision does not directly support the government's contentions here.

Without re-briefing and re-arguing the applicability of this Court's prior decisions on the retroactivity issue, which were thoroughly briefed and argued in **Desist**, respondent submits that this Court should not reverse the Court of Appeal's judgment. We submit that this Court's decision in **Linkletter v. Walker**, 381 U. S. 618 should be followed here and that **Katz** be held applicable here.

First, at trial, the defense objected and the trial Court overruled the defense's contention that the overhearings were illegally obtained. Then, the case was argued on appeal and submitted to the Court prior to the decision in **Katz**. The panel of three judges, relying on **Katz** then held that the trial Court was in error. Next, the Court sitting *en banc* held that prior case law and **Katz** required

that the trial Court's judgment be reversed. The government now contends that a subsequently decided case, **Desist**, should be applied here to reverse the Court of Appeal's decisions.

Although respondent is of the opinion that the rationale of **Linkletter** should be followed here, thereby applying **Katz** here, we submit that if the Court should decide otherwise, at a minimum, this Court should not penalize respondent just because his case went up on appeal after **Katz**. This Court should at least decide this case on its merits without relying on **Katz**. We can appreciate the difficulty the Court might have in trying to turn back the hands of time and decide such complex issues regarding electronic surveillance without considering recent case law. However, as stated previously, the government cites no case that is on all fours with the instant case. **On Lee** can be distinguished and clearly, the Court has not followed the holding in **On Lee**. Thus, until recent times, this Court has not reviewed many electronic surveillance cases and has never decided a case exactly like the instant case. Therefore, the government is mistaken when it suggests that this Court would have positively held for the government if this case had been reviewed prior to the decision in **Katz**.

The government suggests at page 29 of its brief, that neither the action of the government agents nor that of the informant was in violation of the Illinois Eavesdropping Statute. The government relies upon the Illinois Supreme Court's decision in **People v. Dickson**, 22 Ill. 2d 513, 177 N. E. 2d 224, which was decided in 1961, and decided that an electronically assisted overhearing does not violate the statute if **consent** is obtained from one of the parties to the conversation. Again, the government's argument is premised upon its contention that the informant **consented** to the illegal eavesdropping. Thus, knowing that the record does not support the govern-

ment's contention of consent, we submit that there is absolutely no doubt that the government agents and the informant were in violation of the Illinois Eavesdropping Statute. Also, in March, 1966, the Illinois Supreme Court in **People v. Kurth**, 34 Ill. 2d 387, 216 N. E. 2d 154, overruled so much of the **Dickson** opinion as permitted the introduction into evidence of a monitored conversation against the party whose consent had not been obtained. Thus, the decision in **Kurth** made it crystal clear that agents were in violation of the law regardless of whether the informant gave his **consent.**

Here, the federal agents were in criminal violation of Illinois State Statutes in their investigative work. Certainly, their conduct was "manifestly improper" within the meaning of **Lopez**. We submit that this Court should not condone government agents' intentional violation of law. **Elkins v. United States**, 364 U. S. 206; **Rios v. United States**, 364 U. S. 253. As stated in Mr. Justice Holmes' dissent in **Olmstead v. United States**, 277 U. S. 438, 485, "if the government becomes a law-breaker, it breeds contempt for law. . . ."

We urge this Court, in the exercise of its supervisory powers, that the electronic surveillance by the government here should be clearly prohibited by this Court. **Hoffa v. United States**, 385 U. S. 293, 315 (dissent); **McNabb v. United States**, 318 U. S. 332, 341; **Mesarosh v. United States**, 352 U. S. 1, 14.

Respondent submits that it would be better if this Court should decide this case on its merits as the law now stands, for the reason that the decision will have an important effect on the administration of criminal justice. If this case should be reversed, then the government will be free to continue widespread indiscriminate electronic eavesdropping without any judicial sanctions or controls. For this reason alone, this Court should consider the issues on its merits.

Additionally, there has been no claim by the government that there would be a large number of convicted felons affected by the retroactive application of **Katz** to cases on direct appeal at the time of the decision in **Katz**. Thus, if this Court should decide to determine the issue on the basis of general criminal jurisprudence and policy, then this Court should rule on the merits and decide whether federal agents can continue their uncontrolled bugging. However, if this Court should decide that this case should be looked upon as one single case, then we submit that the respondent will be discriminated against if this Court should reverse the Court of Appeal's decisions and hold that although the electronic eavesdropping here came some ten months after the eavesdropping in **Katz**, respondent must go to prison for the reason that his case did not reach the Supreme Court until after the **Katz** case was decided.

IV. **The statutes under which respondent was convicted are invalid for the reason that they violate his rights afforded him under the Fifth Amendment of the Constitution of the United States.**

Without arguing in detail, respondent submits that two of the questions presented in this case are identical to questions presented in two cases which will be heard by this Court during the present term. **Minor v. United States**, No. 189, Oct. Term, 1969; **Turner v. United States**, No. 1474, Oct. Term, 1968. Here, the respondent was convicted under 21 U. S. C., Section 174, which statute is under review in the **Turner** case.[5] Respondent was also convicted under 26 U. S. C., Section 4705 (a) which is under review by this Court in the **Minor** case. Respondent submits that it would not be inappropriate to consider this

[5] The trial Court below instructed the jury that "the defendant's possession alone raises a presumption that the heroin was unlawfully imported and the burden is then upon the defendant to rebut the said presumption . . ." (Tr. 679).

case on these two particular points at the same time the Court considers the **Minor** and **Turner** cases.

Although the respondent never raised the invalidity of the instant statutes at trial or in the Appellate Courts, respondent submits that this Court can properly decide such Constitutional issues here for there can be no waiver of a Constitutional privilege by one who does not know said privilege exists. See **Grosso v. United States**, 390 U. S. 62, 70-71; **Harris v. United States**, 8 Cir., 390 F. 2d 616.

CONCLUSION.

For the reasons stated herein, and in our Brief in Opposition, the respondent is of the view that the judgment below by the three judge panel of the Court of Appeals should be affirmed. Respondent recognizes however that the Court may wish to defer consideration of the questions presented concerning the validity of the two statutes under which respondent was convicted because the issues raised are presently pending in the **Minor** and **Turner** cases.

Respectfully submitted,

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